Office - Supreme Court, U.S.
FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-198

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

CHARLES N. STEELE*
General Counsel
RICHARD B. BADER
Assistant General Counsel
JEFFREY H. BOWMAN
MIRIAM AGUIAR
Attorneys
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

*Counsel of Record

September 28, 1982

TABLE OF AUTHORITIES

	Page
Cases:	
Aptheker v. *Secretary of State*, 378 U.S. 500 (1964)	5
Brown v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, *prob. juris. noted*, ___ U.S. ___, 102 S.Ct. 968 (Dec. 14, 1981)	8
Buckley v. *Valeo*, 424 U.S. 1 (1976)	*passim*
California Bankers Assn. v. *Schultz*, 416 U.S. 21 (1974)	6, 7
Communist Party of Indiana v. *Whitcomb*, 414 U.S. 441 (1974)	5
DeJonge v. *Oregon*, 299 U.S. 353 (1937)	6
Elfbrandt v. *Russell*, 384 U.S. 11 (1966)	6
Healy v. *James*, 408 U.S. 169 (1973)	5
Laird v. *Tatum*, 408 U.S. 1 (1972)	3
NAACP v. *Claiborne Hardware Co.*, ___ U.S. ___, 102 S.Ct. 3409 (July 2, 1982)	5, 6
Noto v. *U.S.*, 367 U.S. 290 (1961)	5
People v. *Epton*, 19 N.Y. 2d 496 (1967), *cert. denied and appeal dismissed*, 390 U.S. 29 (1968)	6
Poe v. *Ullman*, 367 U.S. 497 (1961)	4
United States v. *Robel*, 389 U.S. 258 (1967)	6
Miscellaneous:	
FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S.Rep. No. 755, 94th Cong., 2d Sess. (1976)	2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-198

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

HALL-TYNER ELECTION CAMPAIGN COMMITTEE, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondents rely upon speculation, much of which was not accepted by the courts below, to support their assertions that they have demonstrated a "reasonable probability" that compelled disclosure of their contributors will subject them to harassment, which is the standard required for exemption from the Act's reporting requirements under *Buckley* v. *Valeo*, 424 U.S. 1, 71, 74 (1976). However, as shown in the Petition (pp. 14-16), record evidence rather than supposition is required to satisfy the burden of proof established in

Buckley. In this Reply Brief, we briefly discuss only the most significant examples of the Committee's continuing failure to acknowledge that evidentiary burden.

1. As the district court found (Pet. App. 27a n.8), the FBI's COINTELPRO disruption program was discontinued at the end of 1971. Respondents concede (Br. 8) that the Internal Revenue Service and Central Intelligence Agency activities it relies upon ceased in 1973, and that the FBI stopped adding names to its "Administrative Index" in January of 1976. Moreover, as noted in the Petition (p. 23 n.14), the FBI instituted a policy against "black bag jobs" [*i.e.* break-ins] to obtain documents in 1966, and the Committee presented no evidence that this policy has been altered.[1] Thus, there is nothing in the record to suggest that there was a "reasonable probability" that the Committee's contributors would have been subjected to any of these actions, all of which were—so far as the record in this case indicates—discontinued before the Committee began soliciting contributions.

The only government activity relied upon by the Committee which the record indicates continued after the Committee began its solicitations, is the FBI's foreign intelligence investigation of the Communist Party. Since the district court declined to rule on whether, or to what extent, the FBI must comply with the Committee's subpoena, the only evidence in the record about that investigation is the affidavit of the Assistant

[1] While the Senate Report indicated that a few isolated break-ins occurred after the FBI established this policy, there is nothing to indicate that any of them involved the Communist Party or its supporters. The courts below did not find to the contrary.

Director of the FBI's Intelligence Division affirming that it has been conducted in full accordance with all applicable legal standards (Cregar affidavit, pp. 3-4).[2] This uncontradicted affidavit is corroborated by the Committee's failure to present any evidence of unlawful harassment of its supporters since COINTELPRO ended.

In fact, unlike the Committee, the district court accepted the fact that the ongoing investigation has been conducted lawfully (Pet. App. 27a), but erroneously concluded that the existence of a lawful investigation justified an exemption from the Act's disclosure provision. There is nothing in *Buckley* v. *Valeo*, *supra*, to support the conclusion that lawful government activities, not shown to have involved any threats or harassment, would satisfy the evidentiary burden established in that case for permitting an exemption from the statutory reporting requirement.[3] Such a rule would have the anomalous effect of freeing all candidates and parties who are under active investigation for suspected

---

[2] Contrary to the Committee (Br. 17), the FBI's mere failure to "disavow the existence" of the records subpoenaed by the Committee does not indicate that there are such records. Since the district court failed to rule on the FBI's motion to quash the Committee's subpoena, the FBI had no occasion to search its files to determine whether such records exist.

[3] In *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972), this Court rejected the contention that an unconstitutional "chilling effect" could be demonstrated from the mere fact that the government is investigating certain groups and individuals, even if those individuals fear that the government "may at some future date misuse the information in some way that would cause direct harm to [them]."

illegal or corrupt activities from complying with the Act's provisions designed to protect the electoral process from corruption.

2. The Committee places heavy reliance upon a list of federal and state statutes which assertedly demonstrate "public hostility" to supporters of the Communist Party, and constitute a "threat of prosecution" against contributors whose support of the Committee becomes known (Br. 9-14, 20-24). However, these statutes were enacted decades ago during the McCarthy era, and have long since fallen into disuse. The Committee has been unable to cite a single case in which anyone has been subjected to liability under any of these statutes since 1961, and there has been no attempt to utilize them in many years, even against the Party's publicly active members. The long-standing nonenforcement of these statutes represents "'tougher and truer law than the dead words of the written text.'" *Poe* v. *Ullman*, 367 U.S. 497, 502 (1961). In these circumstances, the mere listing of these statutes does not satisfy the requirement of *Buckley* v. *Valeo* that a "reasonable probability" of harassment of contributors be demonstrated by record evidence. *See* Petition, pp. 14-20.[4]

In fact, any attempt to prosecute individuals under any of these statutes because they contributed to the Committee would face an insurmountable constitutional barrier. Thus, it is not only voluntary governmental nonenforcement which assures that there is no reason-

[4] Nor do these statutes, the product of congressional action in the 1950's and early 1960's, evidence popular animus against the Party in the 1970's and 1980's.

able probability of the Committee's contributors being penalized under these statutes; "the First Amendment ... restricts the ability of the State to impose liability on an individual solely because of his association with another...." *NAACP* v. *Claiborne Hardware Co.*, ___ U.S. ___, 102 S.Ct. 3409, 3429 (July 2, 1982).

> "[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization ... The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims."

Id., quoting Healy v. *James*, 408 U.S. 169, 185-186 (1973). While the statutes cited by the Committee might well have some constitutionally valid applications, this well settled constitutional principle would clearly preclude the imposition of any civil or criminal liability upon individuals who have done nothing more than contribute money to the Communist Party's lawful presidential campaign. This Court has always been alert to protect individuals "in sympathy with the legitimate aims" of the Party from being punished in any way for supporting the Party's "lawful and constitutionally protected purposes...." *Noto* v. *United States*, 367 U.S. 290, 299-300 (1961), *quoted in Aptheker* v. *Secretary of State*, 378 U.S. 500, 511-512 (1964), *and in NAACP* v. *Claiborne Hardware Co., 102 S.Ct at 3429. See also, e.g., Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 447-450 (1974); *United States*

v. *Robel*, 389 U.S. 258, 265-266 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11, 15-19 (1966); *DeJonge* v. *Oregon*, 299 U.S. 353, 364 (1937).[5]

3. Contrary to the Committee's assertion (Br. 16), this Court did address the challenge to the Act's recordkeeping requirement in *Buckley* v. *Valeo*, 424 U.S. at 84. As demonstrated in the Petition (pp. 20-23), in *Buckley* the Court cited *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974) to affirm the conclusion of the court of appeals that a first amendment challenge to the Act's recordkeeping requirement cannot be raised in advance of an attempt to compel disclosure of the records.

Even though no one has yet sought to compel disclosure of its records, the Committee argues that its first amendment challenge to the Act's recordkeeping provision is not premature because it should be assumed that the FBI will obtain its records by burglarizing the Committee's offices (Br. 16-18). However, as noted *supra*, p. 2, there is nothing in the record to support the Committee's speculation that the FBI has conducted break-ins to obtain documents from the Commu-

[5] The only case cited by the Committee to support its theory that these long ignored statutes could be resurrected against its contributors is *People* v. *Epton*, 19 N.Y. 2d 496, 281 N.Y.S. 2d 9, 227 N.E. 2d 829 (1967), *cert. denied and appeal dismissed*, 390 U.S. 29 (1968), which involved a conviction for attempting to incite imminent violence during the 1964 Harlem riots, including soliciting individuals to murder police officers. "It is clear that 'fighting words'—those that provoke immediate violence—are not protected by the First Amendment." *NAACP* v. *Claiborne Hardware Co.*, 102 S.Ct. at 3433. There is no indication that Epton's association with a communist group played any part in his conviction.

nist Party since it altered its policy on break-ins in 1966, ten years before the Committee was formed. The court of appeals refrained from adopting such blatant speculation, relying instead upon the possibility that the Commission might seek to audit the Committee's records (Pet. App. 16a). Nor did the district court speculate about the possibility of FBI break-ins, relying instead upon the assumption that the records might be obtained by possible informants within the Committee (Pet. App. 31a).[6] In short, the court of appeals' holding is legally erroneous, as shown in the Petition (pp. 20-25), and the Committee's different theory fails for lack of evidence, even if it had been legally sound.[7]

---

[6] As shown in the Petition (pp. 22-23 n.14), there is no evidence to support the district court's assumption that there are informants within the Committee; disclosure to mere informants can be forestalled in any event simply by maintaining the records in a secure place. Of course, contrary to the Committee's suggestion (Br. 17), securing the records from disclosure to unauthorized personnel within the Committee would not prevent the Commission from seeking to obtain access to them by legal process.

[7] In *California Bankers Assn.* v. *Schultz*, 416 U.S. at 55-57, this Court found the first amendment challenge to a recordkeeping statute to be premature in the absence of a formal attempt to compel disclosure, despite the existence of a widespread practice of permitting government agents informal access to such records. 416 U.S. at 56 n.26.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition, the Court should issue a *writ* of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit and consider this case in conjunction with *Brown* v. *Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776, *prob. juris. noted*, ___ U.S. ___, 102 S.Ct. 968 (Dec. 14, 1981).

Respectfully submitted,

CHARLES N. STEELE*
General Counsel
RICHARD B. BADER
Assistant General Counsel
JEFFREY H. BOWMAN
MIRIAM AGUIAR
Attorneys
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

*Counsel of Record
September 28, 1982